PUBLIC PROSECUTOR

v.

DERRICK GREGORY

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CRIMINAL TRIAL NO. 1 OF 1983]
12 MARCH 1987

CRIMINAL LAW AND PROCEDURE: *Dangerous drugs - Trafficking in heroin - Section 39B(2) Dangerous Drugs Act 1952 - Drugs found in accused's boots and underpants - Question of presumption - Sections 37(d), (da) - Defence to rebut presumption or raise reasonable doubt in prosecution case.*

CRIMINAL LAW AND PROCEDURE: *Defence of duress - Section 94 Penal Code - Reasonable fear of instant death at very time of commission of offence - Whether any evidence duress was present or continued when accused was arrested - Accused suffers from serious personality disorder - No evidence of mental illness.*

CRIMINAL LAW AND PROCEDURE: *Sentence - Accused's personality disorder - Whether ground of mitigation and as amounting to exceptional circumstances - Offence committed before amendment of s. 39B(2) since 15 April 1983 - Mandatory death sentence - Whether Court has discretion to impose sentence of life imprisonment and whipping or death - Guidelines laid down by Federal Court.*

In this case, the accused was charged for an offence of trafficking in dangerous drugs punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ("the Act"). At the end of the prosecution case, the accused was called for his defence. The accused's counsel informed the Court that the accused wished to make a statement from the dock and that the defence would call two expert witnesses to testify with respect to the accused's mental condition and that he would be relying on s. 94 of the Penal Code (a defence of duress).

Held:

[1] Upon the evidence adduced by the prosecution the Court was satisfied that the prosecution had established a *prima facie* case against the accused which if unrebutted would warrant a conviction and at the conclusion of the prosecution case, called the accused to answer the charge.

[2] Having heard the defence story the Court found that the defence had not only failed to rebut the presumptions under s. 37 of the Act but that the accused had also failed to raise any reasonable doubt in the prosecution case. In fact, from his statement from the dock and the cautioned statement the accused never denied being in possession of the heroin found on him. All in all, there was overwhelming evidence against the accused. Therefore the accused was found guilty as charged and he was convicted.

[3] In order to be able to invoke s. 94 of the Penal Code there must be reasonable fear of instant death at the very time of the commission of the offence. However, if the offence was committed when all danger of instant death has been removed the person committing the offence is not protected under s. 94 of the Penal Code.

[4] The fact that a person suffers from personality disorder or that he was immature and possessing anti-social tendencies are no excuses for him to commit the offence of trafficking in dangerous drugs. There was overwhelming evidence against the accused and that he knew

that he was trafficking in drugs the consequences of which was not only contrary to law, but fatal in effect. There was no connection between his personality disorder and his acts prior to his arrest. It is trite law that in this case, anything short of insanity cannot be a legal defence unless it comes within the general exceptions contained in Chapter IV of the Penal Code (e.g. duress or right of private defence).

[5] The Court rejected the accused's defence of duress because not only it disbelieved him, but there was no iota of evidence of duress which, if existed at the material time, must be imminent, extreme and persistent. In fact, the Court found that the accused had voluntarily placed himself in a situation to do trafficking for monetary gain.

[6] The accused's personality disorder cannot be accepted as a ground of mitigation as it does not amount to exceptional circumstances. On following the sentencing policy laid down by the Federal Court, the Court found no exceptional circumstances to warrant a life sentence and whipping. The accused was accordingly sentenced to death by hanging.

[Accused convicted of trafficking in drugs. Sentenced to death by hanging.]

Cases referred to:
Tan Seng Ann v. PP [1945] 15 MLJ 37
Loh Hock Seng v. Public Prosecutor [1980] 2 MLJ 13
Public Prosecutor v. Oo Leng Swee & Ors. [1981] 1 MLJ 247
Chang Liang Sang & Ors. v. Public Prosecutor [1982] CLJ (Rep) 74
Public Prosecutor v. Tan Hock Hai [1983] CLJ (Rep) 348

Legislation referred:
Criminal Procedure Code, s. 342
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 37A(1), 39B(1)(a), (2)
Penal Code, ss. 84, 94

For the public prosecutor - Josephine Premla Sivaretnam, DPP
For the accused - R. Rajasingam; M/s. R. Rajasingam & Co.

JUDGMENT

Mohamed Dzaiddin J:

The accused was charged before me for an offence of trafficking in dangerous drugs punishable under s. 39B(2) of the Dangerous Drugs Act 1952. The amended charge against him reads as follows:

> That you on 7 October 1982 at about 10.05 a.m. at Bayan Lepas Airport, in the District of Balik Pulau, in the State of Penang, did traffic on your own behalf in dangerous drugs, to wit 576 grammes of heroin, and that you have thereby committed an offence under s. 39B(1)(a) and punishable under s. 39B(2) of the Dangerous Drugs Act 1952.

The facts of the prosecution case were quite straightforward. On 7 October 1982 ASP Abu Shahriman bin Abu Yazid, (PW1) was on duty together with Insp. Mohd. Noor bin Yahaya and 4 detectives at Bayan Lepas International Airport, when at about 10.00 a.m. he noticed the arrival of the accused alighting from a taxi HP 125 driven by Paramasivam (PW9) parked near the departure curb in front of the Singapore Airlines check-in counter. PW1 was standing near the Department of Civil Aviation security scanner. As the accused approached the counter, PW1 stopped and checked him. He asked the accused to take off his black pair of boots which he was wearing. At first the accused was reluctant but eventually he obliged.

He took off the left side and handed it to PW1 who overturned the boot on the luggage platform near the Singapore Airlines counter. PW1 recovered from the left boot seven packets of whitish substance believed to be heroin. He replaced these seven packets in the left boot and then asked the accused to take off the right side where he recovered seven more packets of similar type of whitish substance. PW1 then replaced these packets inside the right boot. According to PW1, he became suspicious of the accused when the latter walked towards the Singapore Airlines counter because he heard some flapping noise because the boots were bigger than his feet. After checking the accused, PW1 took possession of the pair of boots (P3) and Exhibits P4A - 4N together with one British Passport No. 613802D (P5). In addition, he directed two detectives to take possession of accused's sling bag and a luggage bag. Insp. Mohd. Noor also handed to PW1 the Singapore Airlines ticket (P10) bearing the name of the accused, who was scheduled to travel on flight SQ191 for Singapore enroute to San Francisco on the same day.

Later, in his office situated on the ground floor of the Airport terminal, PW1 directed Insp. Mohd. Noor to check the two bags. Nothing incriminating was recovered. After the examination of the accused, PW1 lodged a police report No. 1369/82 (P6) at the Airport police station. Subsequently, the accused and the exhibits were taken to the Police Headquarters, Penang Road. PW1 conducted a body search on the accused's person in the office of DSP Ramalingam where the accused was asked to remove his shirt and trousers. PW1 recovered underneath the accused's underpants, four more packets of whitish substance believed to be heroin (P8A-8D). He took possession of these packets and the underpants (P7). He then lodged another police report No. 2130/82 (P9) at the Police Headquarters. Subsequently he prepared a search list (P11) and handed it together with the exhibits and the accused to Insp. Charles Labung Lawai (PW11), the investigating officer of the case. A copy of P11 was served on the accused who acknowledged receipt (P11B).

Upon receipt of the exhibits and the accused, Insp. Charles (PW11) conducted another search on his person and the bags, but found nothing incriminating. At about 2.15 p.m. on the same day PW11 requested ASP Yeap Hooi Pin (PW10) to record the cautioned statement from the accused. At about 2.30 p.m. the accused gave a statement to PW10 who before recording had ascertained that the provisions of s. 37A(1) of the Dangerous Drugs Act were complied with. Later, PW10 handed the cautioned statement (P18) to PW11.

The investigating officer kept the exhibits in his steel cabinet. On 12 October 1982, after packing the 18 packets of whitish substance and marking them as A1 to A14 and B1 to B4, he sent these packets personally to the Government Chemist, Mr. Sim Hock Lye at the Chemistry Department, Penang. On 20 October 1982 he received back from Mr. Sim the exhibits together with a copy of the Chemist report (P20). On 4 November 1982, he served a copy of the said report on the accused who acknowledged receipt thereof (P20A).

Mr. Sim Hock Lye, the Government Chemist, stated in his report (P20) that upon receipt of the exhibits packed and marked as A1 to A14 and B1 to B4 from PW11, he examined the content of these packets. Upon analysis he found 14 packets (P4A-4N) which weighed a total of 539 gms. of whitish substance to contain 444 gms. of heroin. In packages B1-B4, he found four plastic packets weighing 160 gms. of similar substance which contained 132 gms. of heroin making a total of 576 gms. of heroin. In his opinion, heroin is a "dangerous drug" as defined in s. 2 of the Act.

Upon the evidence adduced by the prosecution, I was satisfied that the prosecution had established a *prima facie* case against the accused, if unrebutted, would warrant a conviction. Accordingly, at the conclusion of the prosecution case, I called the accused to answer the charge.

Defence

When called for his defence, Mr. Rajasingam informed me that the accused wished to make a statement from the dock. In addition, learned Counsel also stated that the defence would call two expert witnesses to testify with respect to the accused's mental condition and that he would be relying on s. 94 of the Penal Code, (a defence of duress).

Briefly, the accused stated that he came to Penang on two occasions in July and October 1982. Before coming here he met a man called Paul Dye who told him that he used to smuggle motorcar spare parts and diamonds. Paul asked him if he was interested in coming to Penang for some business. He agreed. Sometime in July 1982 he was introduced to another man called John Humphries. John gave him a passport. He left together with John for Penang. They were in Penang for a week and returned to London empty-handed. In September 1982, he was asked by Paul Dye to come back to Penang. He was told that at Bayview Beach Hotel, Batu Feringgi, he would meet an American named 'Jack' or 'Kent'. On arrival in Penang, he went to Bayview Beach Hotel where he met 'Kent' who told him that during the previous trip something had gone wrong and had caused the 'Organisation' a fortune. He was told to do some smuggling and that if he refused the 'Organisation' would dump him and they would also get his wife and daughter back home. According to him, there was also another gentleman called 'Turn Tyron'. He also made the same threat on him. He said that when he told Turn that he did not want to smuggle, Turn became angry and said he would "do dirty on me". He became frightened as he understood the expression to mean that he would be killed. When he left for the Bayan Lepas Airport on 7 October 1982 he claimed that Turn Tyron followed him in another taxi. The accused stated that when he was handed the pair of boots and the underpants together with the packets he realised he was smuggling heroin. However, fearing for his life he agreed to carry the drugs.

Upon considering the statement of the accused from the dock it is abundantly clear the accused never denied being in possession of the drugs. However, giving such statement a construction most favourable to him, it would appear to me that the gist of his defence is that he was under duress when he agreed to carry the drugs in his pair of boots and underpants.

In fact, Mr. Rajasingam, counsel for the accused, in his submission conceded that the defence did not dispute the prosecution evidence as to what actually had taken place on the morning of 7 October 1982 at the Bayan Lepas International Airport. In addition, he stated that the defence accepted the evidence of ASP Yeap Hooi Pin (PW10) who recorded the cautioned statement of the accused. Based on his statement and the cautioned statement (P18), counsel submitted that it was clear that the accused was not acting on his own volition. He admitted taking instruction from "Kent" and that he was under duress at the time when he committed the offence. Counsel submitted that a defence of duress under s. 94 of the Penal Code would apply in this case. Section 94 reads as follows:

> Except murder and offences included in Chapter VI punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise

be the consequence: Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1 - A person who, of his own accord, or by reason of a threat of being beaten, joins gang-robbers knowing their character, is not entitled to the benefit of this exception on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2 - A person seized by gang-robbers, and forced by threat of instant death to do a thing which is an offence by law - for example, a smith compelled to take his tools and to force the door of a house for the gang-robbers to enter and plunder it - is entitled to the benefit of this exception.

From my reading of the commentaries of this section, it is clear to me that to invoke s. 94 there must be reasonable fear of instant death at the very time of the commission of the offence. If the offence is completed when all danger of instant death has been removed the person committing the offence is not protected under this section. Further, if the accused on his own accord placed himself in a situation by which he became subject to the threat of any person or persons, whatever threat may have been used towards him, the provisions of the section do not apply. In *Tan Seng Ann v. PP* [1945] 15 MLJ 37, Willan CJ held that duress to be pleaded successfully must be imminent, extreme and persistent. Each case of course depends on the facts and surrounding circumstances. In the present case, I could not find an iota of evidence to suggest that duress was present or continued when the accused was arrested by PW1 at the Bayan Lepas Airport on 7 October 1982, for the fear induced must be fear of instant death present at the time of the act. It was merely on the strength of his statement that he was forced to carry the drugs because if he did not do so, he would be killed by the other syndicate members. In my judgment, this was not true. He was a willing party to the whole transaction. For the above reason, I rejected his defence of duress.

The defence called two prominent consultant psychiatrists to testify for the accused with respect to his mental state. It is worth remembering that the defence did not raise a defence of insanity under s. 84 of the Penal Code. However, from the submission of Mr. Rajasingam, I formed the view that the psychiatric evidence was more to mitigate on the sentence. Bearing in mind that the accused should be given greater latitude in putting up his defence, it was therefore appropriate that I ought to consider their evidence. It all started when the accused was first sent to the Hospital Bahagia, Tanjong Rambutan for psychiatric examination at the request of his counsel, under s. 342 of the Criminal Procedure Code upon an order of this Court dated 19 July 1983. He was in the said Hospital Bahagia from 21 July 1983 until 16 October 1983, under the care of Dr. M. Subramaniam (PW12) who was then the Director and Senior Consultant Psychiatrist at the said hospital. According to PW12 the accused was kept under his observation during this period. He was assisted by two other psychiatrists and trained staff of the Forensic Unit of the said hospital. The observations and examinations took the form of personal interviews, clinical examination of his intelligence and examination of his mental state. In addition, PW12 received from several hospitals in the United Kingdom psychiatric and probation reports about the accused. One of the reports of the psychiatrists, who had treated the accused, stated that he was suffering from disorder of personality not amounting to psychopathic disorder and that he was not suffering from any form of mental disorder. From these information and his own examinations and observations, PW12 was of opinion that there was no evidence of mental illness. He also did not find any evidence, while in the Hospital Bahagia, of personality disorder. However, based on the information

received from the United Kingdom, he was of opinion that the accused might have had a somewhat deviant personality which was characterised by immaturity, inadequacy, difficulty in interpersonal relationship and a strong tendency towards anti-social behaviour. He also took into account, the accused's early history of "chorea" and that he had some learning problems. PW12 stressed that the clinical examination was of the greatest importance to his conclusion.

When asked about the radiologist report regarding C.T. scan of accused's brain (D23), PW12 stated that the report (D23) would not affect his opinion because according to D23, only the third ventricle was minimally dilated, but the rest of the brain was completely normal. Dr. Subramaniam maintained that based on his observations and examinations, he was of opinion that the accused did not suffer from serious personality disorder due to organic brain disease, but only from a personality disorder characterised by immaturity, inadequacy and difficulty in inter-personal relationship. According to him, personality disorders are common in general population.

Next, let me deal with the evidence of defence witnesses. By way of an introduction, Dr. Colin Brewer (DW2) stated that he is a consultant psychiatrist and a director of the Stapleford Unit in Essex, England, which is a private unit specialising in drug addiction and alcoholism. In addition, he holds a string of qualifications and experiences in treatment of mental illness under the British Medical Health Act 1983. However, for this case, he was brought by a private television company known as 20-20 Television Company, London, to come and examine the accused in Penang and his expenses were paid by the said television company. He came to Penang in April 1986 and together with Datuk Dr. Mahadevan (DW3) they met the accused at Penang Prison on 29 April 1986 and at Penang Medical Centre on 30 April 1986. Between them they have had access to copies of the accused's entire medical and probation reports in the United Kingdom and the accused's psychiatric case record at the Hospital Bahagia (P25). DW2 also claimed that he had spoken with the accused's parents and his ex-wife. He had also read the cautioned statement. Whilst at the Penang Medical Centre, they arranged for a C.T. scan of the accused's brain to be done (D23). Based on the materials before them and a two-hour interview with the accused, they prepared a joint report dated 4 May 1986 (D22). The gist of their finding was that the accused suffered from a serious personality disorder secondary to organic (physical) brain disease. Under cross-examination, DW2 stated that on the basis of D23, the accused suffered from an organic brain disease but agreed that he did not state this in the joint report. He also agreed that he did not conduct a neurological examination of the accused. Datuk Dr. Mahadevan (DW3) in his evidence merely confirmed what was stated in D22. When asked about the radiologist report (D23), the witness agreed with the report that other parts of the brain was normal. DW3 also stated that they used the word **"serious"** personality disorder in their report D22 because of his past history. However, he agreed that from his entire medical history, nothing was stated that the accused had suffered from serious personality disorder.

After considering the relevant reports and testimonies of PW12, DW2 and DW3, it is common ground that the accused did not suffer from any mental illness, thereby ruling out a defence under s. 84 of the Penal Code. I was satisfied that Dr. Subramaniam had thoroughly examined and observed the accused at Hospital Bahagia for a period of three months and his examination consisted of personal interviews and full psychiatric examination to search for any evidence, organic or functional, of mental disorder as well as any abnormalities which may indicate a deviation from normality of the accused's personality structure. The clinical assessment of his intelligence was also made. PW12 also had before him information and

records from the United Kingdom, and the radiologist report (D23). Upon these materials and examinations, he came to the conclusion that the accused did not suffer from any brain injury, but only from personality disorder. Upon the above evidence, I accepted the finding of Dr. Subramaniam. On the other hand, I found there was no real basis for the defence witnesses to come to their conclusion that he suffered from a serious Personality Disorder secondary to Organic (Physical) Brain Disease.

It is trite that in this case, anything short of insanity cannot be a legal defence unless it comes within the general exceptions contained in Chapter IV of the Penal Code (e.g. duress or right of private defence). Here, at the end of the prosecution's case, I was satisfied that *a prima facie* case was made out against the accused. Therefore, under s. 37(d) of the Act if any person is proved to have had in his custody or under his control anything whatsoever containing any dangerous drugs, he shall be deemed to have been in possession of the drug and shall, until the contrary is proved, be deemed to have known the nature of it. Further, under para. (da) of the same section if any person is in possession of 100 gms. or more in weight of heroin, he shall be deemed to be trafficking in the said drug, unless he proves to the contrary. It was obvious that in this case, the quantity of heroin found on the accused far exceeded 100 gms., thus raising the presumption of trafficking against him. In my judgment, the defence not only failed to rebut the presumptions under s. 37 of the Act but the accused also failed to raise any reasonable doubt in the prosecution's case. In fact, from his statement from the dock and the cautioned statement (P18) he never denied being in possession of the heroin found on him. On this point, I accepted the testimony of ASP Abu Shahriman (PW1) who stated that at the material time he requested the accused to take out his boots and to overturn them on the luggage counter. He recovered from the pair of boots 14 packets of drugs. Later, at the Police Headquarters, Penang Road, PW1 recovered underneath the accused's underpants 4 more packets of heroin. According to the Chemist Report (P20) of Mr. Sim Hock Lye, the Government Chemist, the 14 packets which weighed 539 gms. contained 444 gms. of heroin and the other 4 packets which weighed 160 gms. contained 132 gms. making a total weight of 576 gms. of heroin. All in all, there was an overwhelming evidence against the accused. Therefore, I found him guilty as charged and I convicted him.

Sentence

As the accused committed his offence before the amendment of s. 39B(2) of the Act which since 15 April 1983 provided for a mandatory death sentence, I have a discretion to impose either a sentence of life imprisonment and whipping or death. But, in exercising my discretion, I am bound by the guidelines laid down by the Federal Court in at least four cases, namely, *Loh Hock Sang v. Public Prosecutor* [1980] 2 MLJ 13; *Public Prosecutor v. Oo Leng Swee & Ors.* [1981] 1 MLJ 247; *Chang Liang Sang & Ors. v. Public Prosecutor* [1982] CLJ (Rep) 741; *Public Prosecutor v. Tan Hock Hai* [1983] CLJ (Rep) 348. In these cases, the sentencing policy in drug trafficking cases seemed to be that other than in the most exceptional circumstances, a sentence of death should be imposed "in order to mark the gravity of the offence, to emphasise public disapproval, to serve as a warning to others, to punish the offenders and most of all to protect the public." (per Raja Azlan Shah, Chief Justice, (as he then was) in *Chang Liang Sang* (*supra*)).

From the facts of the present case, it is clear that the accused was trafficking heroin in substantial amount of 576 gms. No doubt he was a courier, but it is obvious he was part of an international syndicate purchasing drugs from Malaysia for trafficking to the United States. It is evident from his Singapore Airlines ticket (P10) that he was travelling from Penang to

Singapore by SQ191 to take a connecting flight to San Francisco on the same afternoon of 7 October 1982. It is also worthy to note that the ticket was a prepaid travel advice ticket paid for by some undisclosed person and issued to him at the airport upon identification. In addition, one must also remember that the accused was not a first-timer to Penang. He had been here once prior to his arrest with the same intention of trafficking in dangerous drugs. Of course, on both visits, the accused claimed that he was forced into carrying the drugs by the syndicate. I rejected his defence of duress because, not only I disbelieved him, but there was no iota of evidence of duress which, if existed at the material time, must be imminent, extreme and persistent. In fact, I found that he had voluntarily placed himself in a situation to do trafficking for monetary gain.

Next, on the basis of psychiatric evidence, Mr. Rajasingam claimed that the accused was a sick man and that the Court should accept it as a ground of mitigation. Again, I cannot accept this submission as amounting to exceptional circumstances. First, the fact that a person suffers from personality disorder or that he was immature and possessing anti-social tendencies are no excuses for him to commit the offence of trafficking in dangerous drugs. After all, personality disorders are common amongst us. Secondly, from the evidence, the accused knew that he was trafficking in drugs the consequence of which was not only contrary to law, but fatal in effect. There were sufficient evidence to show that his two visits to Penang were made with the sole purpose of trafficking in dangerous drugs. He had spent several days with his accomplices and moved from one hotel to another (perhaps to avoid detection). Even on the morning of his arrest, he travelled from a hotel in Georgetown to the Lone Pine Hotel at Batu Ferringi and made his taxi to wait for him before departing for the airport. It is obvious that he knew what he was doing. Seriously, I cannot see any connection between his personality disorder and his acts prior to his arrest. For the above reasons, and adhering myself to the sentencing policy laid down by the Federal Court I find no exceptional circumstances to warrant a life sentence and whipping. The accused was, accordingly, sentenced to death by hanging.

Also found at [1988] 1 CLJ 69